

ARREST WARRANT

09045222
789

DZM065 CII:
000000626851

FBI:

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS

KATHEY FYKE

SUNNYVALE

CA 94086

DEFENDANT

CEN: 09519575
DOCKET NO: CC948971
DRIVER'S LIC NO: [REDACTED] @ 9
AGENCY CASE NO: 0602331

DESCRIPTION

BIRTHDATE: [REDACTED]
HEIGHT: 501 WEIGHT: 120
HAIR: BR EYES: HZ SEX: F

REMARKS:

RACE: WHITE

SERVICE AGENCY: 04300

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY PEACE OFFICER OF SAID STATE:
COMPLAINT UNDER OATH HAVING BEEN MADE BEFORE ME BY:

4445 REINHARDT

DISTRICT ATTORNEY'S OFFICE

THAT THE OFFENSE OF:

(M) PC470(C)

PR#

(M) PC186(A)(4)

A MISDEMEANOR
KATHEY FYKE

HAS BEEN COMMITTED, AND ACCUSING:

THEREOF,

YOU ARE THEREFORE COMMANDED TO ARREST THE ABOVE NAMED DEFENDANT AND BRING SAID DEFENDANT FORTHWITH BEFORE THE ENTITLED COURT.

THIS WARRANT IS NOT ELIGIBLE FOR NIGHT SERVICE PER SEC 840.

DEFENDANT MAY BE ADMITTED TO BAIL IN THE SUM OF \$ 10,000⁰⁰

FILED

JUL 24 2009

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY *[Signature]* DEPUTY

WITNESS MY HAND AND SEAL,

DATE: 07/13/2009
HALL OF JUSTICE
190 WEST HEDDING STREET
SAN JOSE, CA 95110

MAILING ADDRESS IS:
191 N. FIRST STREET
SAN JOSE, CA 95113



JUDGE PAUL R. TELH, SUPERIOR COURT

PAUL R. TELH

APPEARANCE TIMES AND DATES:
09:00 MONDAY THRU FRIDAY MISD
09:30 MONDAY THRU FRIDAY FEL
14:00 MONDAY THRU FRIDAY FEL



POST CONSUMER RECYCLED PAPER

ARREST WARRANT

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
SAN JOSE FACILITY
COMPLAINT FOR ARREST WARRANT(S)
KATHEY FYKE DZN599

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
KATHEY FYKE (3/2/1953),
[REDACTED], SUNNYVALE, CA 94086
Defendant(s)

DOCKET NO. CC948971

SECOND AMENDED
MISDEMEANOR COMPLAINT

DA NO: 090718368
CEN
* KF WARR *

FILED

APR 19 2010

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY [Signature] DEPUTY

The undersigned is informed and believes that:

COUNT 1

On or about and between April 1, 2007 and April 30, 2007, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 2

On or about and between May 1, 2007 and May 31, 2007, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 3

On or about and between June 1, 2007 and June 30, 2007, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 4

On or about and between July 1, 2007 and July 31, 2007, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 5

On or about and between August 1, 2007 and August 31, 2007, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 6

On or about and between September 1, 2007 and September 30, 2007, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 7

On or about and between October 1, 2007 and October 31, 2007, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 8

On or about and between November 1, 2007 and November 30, 2007, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 9

On or about and between December 1, 2007 and December 31, 2007, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 10

On or about and between January 1, 2008 and January 31, 2008, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 11

On or about and between February 1, 2008 and February 28, 2008, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 12

On or about and between April 1, 2008 and April 30, 2008, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 13

On or about and between May 1, 2008 and May 31, 2008, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 14

On or about and between June 1, 2008 and June 30, 2008, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 15

On or about July 14, 2008, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of Service.

COUNT 16

On or about and between August 1, 2008 and August 31, 2008, in the County of Santa Clara, State of California, the crime of FORGERY OF A COURT JUDGMENT OR PROCESS, in violation of PENAL CODE SECTION 470(c), a Misdemeanor, was committed by KATHEY FYKE who did, with the intent to defraud, alter, corrupt and falsify a record of a court judgment or the return of any officer to a process of a court, Proof of service.

COUNT 17

On or about August 14, 2008, in the County of Santa Clara, State of California, the crime of CONTEMPT OF COURT- WILLFULLY DISOBEDIENCE OF THE TERMS OF ANY PROCESS AND LAWFUL COURT ORDER, in violation of PENAL CODE SECTION 166(a)(4), a Misdemeanor, was committed by KATHEY FYKE who did willfully disobey the terms as written of a process and court order and out-of-state court order, lawfully issued by a court, including orders pending trial, Court order concerning release of funds from sale of residence.

DISCOVERY REQUEST

Pursuant to Penal Code sections 1054 through 1054.7, the People request that, within 15 days, the defendant and/or his/her attorney disclose: (A) The names and addresses of persons, other than the defendant, he/she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial; (B) Any real evidence which the defendant intends to offer in evidence at the trial. This request is a continuing request, to cover not only all such material currently in existence, but all material which comes into existence to the conclusion of this case.

Further, attached and incorporated by reference are official reports and documents of a law enforcement agency which the complainant believes establish probable cause for the arrest of defendant KATHEY FYKE, for the above-listed crimes. Wherefore, A WARRANT OF ARREST IS REQUESTED.

Complainant therefore requests that the defendant(s) be dealt with according to law.

I certify under penalty of perjury that the above is true and correct.

Executed on April 5, 2010, in SANTA CLARA County, California.

Warrant received for service by:

on _____
Cash or Bond \$ _____

Reinhardt 4445
(Reinhardt 4445)
DABOI (408) 792-2931 B20090602331 ***
SCHON/ D271/ MISDEMEANOR/ ap

JUDGE OF THE SUPERIOR COURT

1 LAW OFFICES OF THE PUBLIC DEFENDER
2 MARY J GREENWOOD, # 99728
3 EMANUELLA CHRYSOGLOU, # 228821
4 County of Santa Clara
5 120 West Mission Street
6 San Jose, CA 95110
7 Telephone: (408) 299-7764
8 Attorneys for Defendant

FILED

JUN 04 2010

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
By Superior Court of CA County of Santa Clara DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA, NO: CC948971

Plaintiff, DEMURRER TO DISTRICT
vs. ATTORNEY'S MOTION TO AMEND
ORIGINAL COMPLAINT

KATHEY FYKE,

Defendant

Pursuant to Penal Code Section 1004 (1) Defendant hereby demurs the District Attorney's Motion to Amend the Complaint filed on April 6, 2010. Penal Code Section 1004(1) states that a defendant may demur " If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein:" Penal Code section 1004(1) includes within it that a demurrer may occur when the statute of limitations has run. See In Re Demillo (1975) 14 C3d598, 121 CR 725.

In this case the misdemeanor charges that the District Attorney is seeking to add are outside of the limitations. The original complaint was filed July 28, 2009, but now in 2010 The District Attorney is seeking to add 9 counts all involving charges that allegedly occurred in 2007, 5 counts of charges that allegedly occurred in January 2008, February 2008, April 2008, May 2008, and June 2008 respectively. These charges are well outside of and barred by the

1 statute of limitations. The other additional charge that is being filed is a charge that allegedly
2 occurred in August 2008. Since the motion to amend was filed in April 2010, that charge is also
3 barred by the statute of limitations. We also demur the charge that allegedly occurred on July
4 14, 2008 as being outside of the statute of limitations since the original complaint was filed July
5 28, 2009.

6 We respectfully ask the court to bar the district attorney from filing these additional
7 charges and we ask the court to dismiss count 1 of the original complain because it too is
8 outside of the statute of limitations of when that complaint was filed.

9

10

11 Dated: 6/4 / 10

Respectfully Submitted

Mary J. Greenwood

Public Defender



Emanuella Chrysoglou

Deputy Public Defender

1 JEFFREY F. ROSEN (SBN 163589)
2 DISTRICT ATTORNEY
3 DEBORAH HERNANDEZ (SBN 267842)
4 DEPUTY DISTRICT ATTORNEY
5 70 West Hedding Street
6 San Jose, California 95110
7 Telephone: (408) 792-2868
8 Facsimile: (408) 998-1540

9 Attorneys for the People of the State of California

FILED

MAY 23 2011

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8

9 SANTA CLARA COUNTY JUDICIAL DISTRICT

10 PEOPLE OF THE STATE OF) Case No.: CC948971
11 CALIFORNIA,) }
12 Plaintiff,) PEOPLE'S MOTIONS TO DISMISS
13 vs.) } Date: MAY 23, 2011
14 KATHEY FYKE, Defendant.) Time: 9:00 A.M.
) Dept.: 51

15
16 THE PEOPLE OF THE STATE OF CALIFORNIA, IN AND FOR SANTA CLARA
17 COUNTY, submit this brief in support of its Motion to Dismiss.

18 Dated: May 23, 2011

19 Respectfully submitted,
20 JEFFREY F. ROSEN
21 District Attorney

22 Deborah Hernandez
23 Deborah Hernandez
24 Deputy District Attorney

1

STATEMENT OF FACTS

2

3 This criminal action arises out of a divorce proceeding filed in the Santa Clara County
4 Superior Court – Family Law Division under docket 1-03-FL-116312 (Richard Falcone v.
5 Kathey Fyke)

6

Count One: Penal Code Section 470(c)

7

8 Eighty-seven (87) Proofs of Service were filed with the Court, on behalf of Kathey Fyke,
9 bearing the name of the server “Dora Williams.” Staff at the Law Offices of Lynn Yates Carter
10 noticed the signature “Dora Williams” was very similar to Ms. Fyke’s writing. As a result, the
11 Proofs of Service were examined by an expert forensic examiner who found that it was “highly
12 probable” (95%) certain that the signature had been written by Ms. Fyke. During a Court Trial
13 held in August, 2008, Ms. Fyke was given the opportunity to present Ms. Williams. Ms. Fyke
14 failed to do so. (Exhibit “A”)

15

Count Two: Penal Code Section 166(a)(4)

16

17 On April 16, 2007 an Order was filed in which the proceeds of the sale of the family
18 residence located at [REDACTED] Saratoga, California, was to be placed in a
19 special-interest bearing trust account. The funds were not to be accessed without written
20 agreement of the parties or further order of the Court (exhibit “B”).

21 On August 14, 2008, Ms. Fyke went to Washington Mutual, where the trust account was
22 held. She accessed the account. Ms. Fyke withdrew \$1.00 from the account and deposited
\$1.01 into the account. Both transactions were made on the same day.

23 At the August, 2008 Court trial, Alice Chastain, a bank manager for Washington Mutual,
24 testified that the account was accessed by Ms. Fyke after she convinced another bank manager,
25 John Jellison, to help her conduct a test. (Exhibit “C”). After the Court trial, the Honorable
Thomas Cain scheduled a contempt hearing for August 22, 2009.

26 In June 2009, the instant case was filed charging Ms. Fyke with a violation of Penal Code
27 section 470(c) [Forgery] and a violation of Penal Code section 166(a)(4) [Contempt of Court –
Willful Disobedience of the Terms of any Process and Lawful Court Order]. Since this time,
there have been several Pretrial Conferences and other hearings.

28 On Tuesday, May 17, 2011 in anticipation of the scheduled criminal Jury Trial, I
contacted defense counsel to discuss the case and the probability of the case proceeding. During

1 our conversation, I inquired as to whether Ms. Fyke was ever found in contempt in the Family
2 Court. Defense counsel did not believe Ms. Fyke was held in contempt but represented that Ms.
3 Fyke was sanctioned for the behavior that underlies the current charges. Defense counsel
represented that she would look through her file for the order.

4 On Wednesday, May 18, 2011, I visited the Family Court and reviewed several volumes
5 of the Falcone v. Fyke divorce action. The file consists of 42 volumes. I located and obtained a
6 copy of a February 19, 2007 "Amended Order Re Attorney's Fees and Costs" which was a
7 direct result of the February 2008 Court trial. Ms. Fyke had been ordered to pay Petitioner
8 (Richard S. Falcone) \$833,025.72 in fees, costs, and sanctions. (Exhibit "D"). The order
9 specifically referenced a "Proposed Statement of Decision" filed December 11, 2008 wherein
10 the Court makes reference to the 87 Proofs of Service, the withdrawal of \$1.00 from the trust
account, and other issues. (Exhibit "E")

11 **POINTS AND AUTHORITIES**

12 The court's discretion to dismiss under Penal Code section 1385 in the furtherance of
13 justice is very broad. Furtherance of justice requires consideration of the constitutional rights of
14 the defendant and the interests of society represented by the People. (*People v. Orin* (1975) 13
15 Cal.3d 937, 945; *People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 144.) In this
16 evaluation the court must consider the interests of the People as equal in importance to the rights
17 of the accused. (*People v. Andrade* (1978) 86 Cal.App.3d 963, 976.) "'[I]n view of the
18 fundamental right of the People to prosecute defendants upon probable cause to believe they are
19 guilty [citations], neither judicial convenience, court congestion, nor judicial pique, no matter
20 how warranted, can supply justification for an order of dismissal.' " (*People v. Ferguson* (1990)
218 Cal.App.3d 1173, 1183.)

21 "The reasons for the dismissal must be set forth in an order entered upon the minutes."
22 (Pen. Code § 1385, subd. (a).) This requirement is mandatory. (*People v. Bonnetta* (2009) 46
23 Cal.4th 143, 149-151.) Moreover, the reasons given must be such as would motivate a
24 reasonable judge. (*People v. Orin, supra*, 13 Cal.3d at p. 945; *People v. Borousk* (1972) 24
25 Cal.App.3d 147, 163.) "In the light of the importance to the administration of criminal justice of
26 not having a case brought by the People of the State of California thrown out of court except for
27 a reason which can be said to be that which would motivate a reasonable judge, we conclude
28

1 that a judge does not have absolute discretion to dismiss a criminal case." (*People v. Curtiss*
2 (1970) 4 Cal.App.3d 123, 126.)
3
4

Based on the above, the People seek a dismissal of this action, in the interest of justice.
Ms. Fyke has been sanctioned by the Family Court, for her actions which underlie the criminal
charges, in the amount of \$833,025.72. Further punishment would be superfluous.

Dated: May 23, 2011

Respectfully submitted,
JEFFREY F. ROSEN
District Attorney


Deborah Hernandez
Deputy District Attorney

EXHIBIT "A"

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF SANTA CLARA

5 RICHARD FALCONE)
6 PETITIONER,)
7 VS.) NO. 103-FL-116312
8 KATHEY FYKE,)
9 RESPONDENT.)

COPY

REPORTER'S TRANSCRIPT OF EXCERPT OF PROCEEDINGS

BEFORE THE HONORABLE THOMAS WM. CAIN, JUDGE

AUGUST 13, 2008

A P P E A R A N C E S:

FOR PETITIONER: LYNN YATES-CARTER
ATTORNEY AT LAW

FOR DEFENDANT: KATHEY FYKE
IN PROPRIA PERSONA

27 | OFFICIAL COURT REPORTER: PAMELA CARDIFF, CSR
CERTIFICATE NO. 11430

1 SAN JOSE, CALIFORNIA

AUGUST 13, 2008

2 EXCERPT OF PROCEEDINGS

3

4

5 KATHEY FYKE,

6 called as a witness on behalf of the Plaintiff, after
7 having first been duly sworn, was examined and testified
8 as follows:

9 DIRECT EXAMINATION

10 BY MS. YATES-CARTER:

11 Q. Ms. Fyke, where do you reside?

12 A. [REDACTED] Sunnyvale.

13 Q. Ms. Fyke -- I'm sorry, was she sworn in?

14 THE COURT: Yes, she was.

15 BY MS. YATES-CARTER:

16 Q. You realize you are under oath?

17 A. Of course.

18 Q. Ms. Fyke, who is Dora Williams?

19 A. A friend of mine.

20 Q. And how did you meet Dora Williams?

21 A. Through our kids, years ago.

22 Q. Where does Ms. Williams reside?

23 A. Sunnyvale.

24 Q. Where in Sunnyvale?

25 A. Behind the little Safeway.

26 Q. What street is that?

27 A. I don't remember off the top of my head.

28 MS. YATES-CARTER: If I may approach the

1 witness, Your Honor.

2 THE COURT: You may.

3 BY MS. YATES-CARTER:

4 Q. Ms. Fyke, during this litigation, did Dora
5 Williams sign numerous proofs of service on your behalf?

6 A. Yes, she did.

7 Q. Let me show you a packet of those proofs of
8 service.

9 If I can, I would like to get this item marked
10 for identification as our first in order.

11 THE COURT: This will be Petitioner's number
12 one for identification. And how many items do we have?

13 MS. YATES-CARTER: I believe there are
14 roughly 87, Your Honor.

15 THE COURT: These are all proofs of service?

16 MS. YATES-CARTER: Yes. Provided by
17 Ms. Fyke to my office.

18 THE COURT: So these would be collectively
19 designated as Petitioner's number one for
20 identification.

21 (Whereupon, Exhibit 1 was marked for identification.)

22
23 MS. YATES-CARTER: If I may approach the
24 witness, Your Honor.

25 THE COURT: You may.

26 BY MS. YATES-CARTER:

27 Q. Ms. Fyke, showing you Petitioner's 1, do you
28 recognize these proofs of service?

- 1 A. I trust you if that's what you say they are.
2 Q. Why don't you look through them.
3 A. Yes.
4 Q. Who signed those proofs of service, Ms. Fyke?
5 A. Says Dora Williams.
6 Q. Did you sign them?
7 A. No.
8 Q. They were signed by Dora Williams?
9 A. That's what it says.
10 Q. And what address is listed as being Dora
11 Williams' address?
12 A. It's [REDACTED]
13 Q. Are you familiar with [REDACTED]
14 A. Not that I can sit there and say that's [REDACTED] [REDACTED]
15 Avenue.
16 THE COURT: I'm sorry. Did we get a city on
17 [REDACTED] Avenue?
18 MS. YATES-CARTER: Sunnyvale.
19 THE COURT: Thank you.
20 BY MS. YATES-CARTER:
21 Q. Ms. Fyke, how would Ms. Williams get a document
22 from you that she subsequently mailed out? Did you take
23 it to her [REDACTED] Avenue?
24 A. No.
25 Q. How did she obtain those documents?
26 A. I would usually meet her at work.
27 Q. At work. Where does she work?
28 A. At a store on El Camino.

1 Q. What store?

2 A. I'm not a hundred percent sure the name of it. I
3 can find out for you.

4 Q. Ms. Fyke, I'm going to show you some specific
5 proofs of service, because I would like you to identify
6 the signature on those proofs of service. May I have
7 these mark as a Petitioner measure's next order?

8 THE COURT: Petitioner's number 2 for
9 identification. We have how many?

10 MS. YATES-CARTER: Three.

11 THE COURT: Three.

12 (Whereupon, Petitioner's Exhibit 2 was marked for
13 identification.)

14 BY MS. YATES-CARTER:

15 Q. Ms. Fyke, I'm going to show you three individual
16 proofs of service. First one is dated August 6th, 2007.
17 The second is dated July 28th, '08. The third is dated
18 September 5th of 2007. Could you look those over?

19 A. Okay.

20 Q. Do you recognize the signature on those
21 documents?

22 A. Says Dora Williams..

23 Q. Did Dora Williams sign those proofs of service?

24 A. I imagine she did.

25 Q. Is it your testimony that you did not sign those
26 proofs of service?

27 A. Says Dora Williams on it.

28 Q. I'm asking you if you, yourself -- I don't care

1 what it says -- I'm asking you if you, yourself, signed
2 these proofs of service?

3 A. No.

4 MS. YATES-CARTER: I would ask Petitioner's
5 one and two be admitted into evidence at this time.

6 THE COURT: Okay. They are received into
7 evidence.

8 MS. YATES-CARTER: Thank you.

9 (Whereupon, Petitioner's Exhibit 2 was received into
10 evidence.)

11 BY MS. YATES-CARTER:

12 Q. Ms. Fyke, I have another document I want to show
13 you and that is a copy of a letter.

14 Ask this be marked for identification at this
15 time?

16 THE COURT: Petitioner's number 3.

17 THE COURT: The date on the letter?

18 MS. YATES-CARTER: It does not have a date
19 on it.

20 THE COURT: And it consists of what, how
21 many pages, just one page?

22 MS. YATES-CARTER: It's about four pages, I
23 believe.

24 THE COURT: Four pages and it's a hand
25 written letter.

26 MS. YATES-CARTER: Handwritten letter
27 starting out, Dear Rich.

28 (Whereupon, Petitioner's Exhibit 3 was marked for

1 identification.)

2 BY MS. YATES-CARTER:

3 Q. Can I ask you to examine this letter, copy of
4 this letter. Do you recognize this letter?

5 A. Okay.

6 Q. Who wrote that letter?

7 A. I believe I did.

8 MS. YATES-CARTER: Thank you. I ask this be
9 admitted into evidence at this time, Your Honor.

10 THE COURT: It is received into evidence.

11 MS. YATES-CARTER: Thank you.

12 (Whereupon, Petitioner's Exhibit 3 was received into
13 evidence.)

14 BY MS. YATES-CARTER:

15 Q. Miss Fyke, during the course of this litigation,
16 have you ever signed a proof of service yourself?

17 A. I don't recall.

18 Q. Well, is it your testimony that you have never
19 signed a proof of service yourself?

20 A. I don't remember.

21 Q. Other than Dora Williams, have you had other
22 people serve documents in the case?

23 A. Yes.

24 Q. Who are the other people?

25 A. Ghedai -- G-H-E-D-E-A -- A-I -- G-H-E-D-A-I.

26 Q. Anyone else?

27 A. L-O-R-R-I.

28 Q. Is that Lorri Geiger?

1 A. G-E-I-G-E-R.

2 Q. Ms. Fyke -- as far as you know --

3 THE COURT: Sorry. She said, "Do you want
4 more?"

5 BY MS. YATES-CARTER:

6 Q. Are there any others?

7 A. There's a gentleman at one of those box office --
8 not box office -- post office to go places.

9 Q. Mm-hmm. Anybody else?

10 A. Might be, but I don't recall.

11 Q. At the present time, Ms. Fyke, is it your
12 understanding that Dora Williams resides at 1070 Reed
13 Avenue in Sunnyvale?

14 A. I don't know that anymore. That's what's on
15 the -- it's like there's a master proof of service that
16 I pull up. I know for a while I had Ghedai's address
17 wrong.

18 Q. Who prepares the proofs of service?

19 A. I usually do.

20 Q. When you prepare the proofs of service -- and I'm
21 including the one that was dated July 28th of '08 -- was
22 it your understanding that Dora Williams still resided
23 at [REDACTED] in Sunnyvale?

24 A. I can't say that that particularly went through
25 my head, no.

26 THE COURT: Okay. We need the microphone
27 over towards you because we can't hear you.

28 THE WITNESS: I'm sorry.

1 BY MS. YATES-CARTER:

2 Q. Ms. Fyke, did Dora Williams also sign the proof
3 of service for documents you submitted to the appellate
4 court?

5 A. I don't know.

6 Q. You don't know who signed the proofs of service?

7 A. (Witness shakes head.)

8 Q. Did you sign those proofs of service?

9 A. I don't know. If you have something for me to
10 see --

11 Q. Did Dora Williams sign the proofs of service on
12 the documents you submitted to the California Supreme
13 Court?

14 A. Again, I said, I am not sure who signed what
15 when. This has been going on for years. If you've got
16 something you want me to see, I'll be glad to look at.

17 MS. YATES-CARTER: I have nothing further of
18 this witness, Your Honor. I will recall her later on in
19 my case.

20 THE COURT: Okay. Thank you. You may step
21 down. Your next witness.

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1 STATE OF CALIFORNIA)
2) SS.
3 COUNTY OF SANTA CLARA)
4
5

6 I, PAMELA CARDIFF, DO HEREBY CERTIFY THAT THE
7 FOREGOING IS A FULL, TRUE AND CORRECT TRANSCRIPT OF THE
8 PROCEEDINGS HAD IN THE WITHIN-ENTITLED ACTION;

9 THAT, I REPORTED THE SAME IN STENOTYPE BEING
10 THE QUALIFIED AND ACTING OFFICIAL COURT REPORTER OF THE
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR
12 THE COUNTY OF SANTA CLARA, APPOINTED TO SAID COURT, AND
13 THEREAFTER HAD THE SAME TRANSCRIBED INTO TYPEWRITING AS
14 HEREIN APPEARS.

15
16 DATED THIS 22nd DAY OF AUGUST, 2008.
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20 PAMELA CARDIFF, CSR
21 CERTIFICATE NO. 11430
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EXHIBIT “B”

PERIOR COURT OF CALIFORNIA
UNTY OF SANTA CLARA
AMILY LAW DIVISION
170 Park Center Plaza
San Jose, California 95113

FOR COURT USE ONLY

FILED

APR 16, 2007

KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY
K. SOLTERO

PETITIONER/PLAINTIFF: Richard S. Falcone

RESPONDENT/DEFENDANT: Kathey Fyke

INTERIM REPORT OF REFEREE AND ORDER

CASE NUMBER: 1-03-FL-

116312

APJ: Lucas

The undersigned was appointed initially as Referee and subsequently as Judge Pro Tempore to oversee the sale of the parties' real property located at [REDACTED] Drive, Saratoga, CA. In my capacity as Referee, I find the following facts to be true: the real property is currently under contract; escrow is scheduled to close by no later than May 3, 2007; net proceeds of sale are estimated to be in excess of \$2.7 million; the parties do not currently have an agreement for disbursement of the proceeds. I have been contacted by one of the realtors concerning the need for an order directing the title company to disburse the proceeds at the close of escrow.

I recommend that the court make the following orders:

1. That North American Title Company release the net proceeds of sale to Lynne Yates-Carter, Esq., attorney for Petitioner Richard S. Falcone as trustee for Richard S. Falcone and Kathey Fyke;
2. That Ms. Yates-Carter place the net proceeds in a special interest-bearing trust account as trustee for Richard S. Falcone and Kathey Fyke ; and
3. That funds be released from the special interest-bearing trust account only upon the

written agreement of the parties or further order of the Court.

Respectfully submitted,

Date: April 12, 2007

Edward F. Mills
Edward F. Mills, Referee

Based upon the report of Referee Edward F. Mills, and good cause appearing,
IT IS ORDERED.

4. 1. That North American Title Company release the net proceeds of sale of the real property located at [REDACTED] Drive, Saratoga, CA. p to Lynne Yates- Carter, Esq., attorney for Petitioner Richard S. Falcone as trustee for Richard S. Falcone and Kathey Fyke;
2. That Ms. Yates-Carter place the net proceeds of sale in a special interest-bearing trust account as trustee for Richard S. Falcone and Kathey Fyke; and
3. That funds be released from the special interest-bearing trust account only upon the written agreement of the parties or further order of the Court.

Date: 4/16/07

Patricia M. Lucas
Patricia M. Lucas, Judge
Superior Court of the County of Santa Clara

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
ATTEST: DAVID H. YAMASAKI

APR - 8 2010

CHIEF EXECUTIVE OFFICER/CLERK
SUPERIOR COURT OF CA COUNTY OF SANTA CLARA
IN AND FOR THE COUNTY OF SANTA CLARA
BY A Rodriguez DEPUTY

A RODRIGUEZ



In the Superior Court of the State of California
IN AND FOR THE COUNTY OF SANTA CLARA

IN RE THE MATTER OF:

FALCONE, Richard and FYKE, Kathey

(X) PROOF OF SERVICE BY MAIL OF: Order On Respondent's Motion To Compel Discovery And For Sanctions And Petitioner's Motion To Deem Service Invalid and Interim Report Of Referee And Order

() PROOF OF PERSONAL SERVICE OF:

FILED
APR 16 2007

KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY _____
K. SOLTERO

() PROOF OF SERVICE BY FASCIMILIE:

CASE NO.: 103 FL116312

I certify that I am not a party to this cause and that a true copy of this document was mailed first class postage prepaid in a sealed envelope addressed as shown below and the document was mailed at:

KIRI TORRE, CHIEF EXECUTIVE OFFICER

E, CHIEF EXECUTIVE O
M. J. Clark

Deputy Clerk

San Jose, California on April 16, 2007

Kathey Fyke

Sunnyvale, CA 94086

Lynne Yates Carter, Esq.
111 W. St. John Street, #300
San Jose, CA 95113

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
ATTEST: DAVID H. YAMASAKI

APR - 8 2010



**CHIEF EXECUTIVE OFFICER/CLERK
SUPERIOR COURT OF CA COUNTY OF SANTA CLARA
IN AND FOR THE COUNTY OF SANTA CLARA**

A RODRIGUEZ

41A

EXHIBIT "C"

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF SANTA CLARA
3
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5 RICHARD FALCONE)
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REPORTER'S TRANSCRIPT OF EXCERPT OF PROCEEDINGS

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BEFORE THE HONORABLE THOMAS WM. CAIN, JUDGE

AUGUST 15, 2008

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A P P E A R A N C E S:

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FOR PETITIONER:)
LYNN YATES-CARTER
ATTORNEY AT LAW

FOR DEFENDANT:)
KATHEY FYKE
IN PROPRIA PERSONA

OFFICIAL COURT REPORTER:)
PAMELA CARDIFF, CSR
CERTIFICATE NO. 11430

1 SAN JOSE, CALIFORNIA

AUGUST 15, 2008

2 EXCERPT OF PROCEEDINGS

3
4 THE COURT: Ms. Chastain, if you would
5 return to the stand. Again, you are still under oath.

6 ALICE CHASTAIN,
7 called as a witness on behalf of the Petitioner, having
8 previously been duly sworn, resumed the stand, was
9 further examined and testified as follows:

10 FURTHER CROSS-EXAMINATION

11 BY MS. FYKE:

12 Q. Were you able to get the document for me?

13 A. No. I was not. I asked at the bank. I didn't
14 have a copy of it. I asked and the person who opened
15 the account was not there, but the other person who was
16 opening accounts at the same time said they no longer do
17 the Platinum, and he thought at that time that was the
18 best interest.

19 Q. Okay. Yesterday you testified about how you set
20 up the trust account.

21 A. Yes.

22 Q. Are you familiar -- can you share with me what
23 fiduciary or what you think fiduciary means?

24 A. Well, it means someone has a duty to someone
25 else.

26 Q. Okay. And when you set up this account, it was
27 set up in a protected mode, so who had authorization to
28 it?

1 A. To do what?
2 Q. Withdrawals, whatever?
3 A. Just to withdraw, Lynn Yates-Carter and me.
4 Q. Could you withdraw?
5 A. Yes.
6 Q. And Ms. Yates-Carter?
7 A. Yes.
8 Q. Could Mr. Falcone withdraw?
9 A. No.
10 Q. Could I withdraw?
11 A. No.

12 MS. FYKE: Can you mark this one for me?

13 THE COURT: This will be --

14 THE CLERK : H.

15 THE COURT: Respondent's H.

16 MS. FYKE: Washington Mutual Bank, trust
17 fiduciary master account agreement.

18 THE COURT: Does it have a date? Sorry.

19 Does it have a date?

20 THE CLERK: Looks like date change August.

21 MS. FYKE: Yeah. There's no real date on
22 it, but there's a date change, 8-14-2008.

23 THE CLERK: There's no signature.

24 THE COURT: So there's no original date, but
25 there's some notation that something was changed on
26 August 14th?

27 MS. FYKE: Yeah.

28 THE COURT: Okay. This will be marked as

1 Respondent's H for identification.

2 (Whereupon, Respondent's Exhibit H was marked for
3 identification.)

4 BY MS. FYKE:

5 Q. Does that document look familiar to you at all or
6 have you ever seen anything that looks like that?

7 A. I have definitely seen something that looks like
8 this. It looks like it's something that someone had
9 printed out which shows part of the signature page that
10 we signed when we set up the account.

11 Q. And does the top of yours say master -- okay.
12 Says master account agreement. Okay. And consistent
13 with your testimony is that only you and
14 Ms. Yates-Carter have access to this; right?

15 A. We are the only ones who are -- who can withdraw,
16 yes.

17 Q. And the purpose of that is to keep the funds
18 safe; correct?

19 A. Yes.

20 Q. So neither one of the parties can take off to
21 Tahiti was the money?

22 A. Well, the purpose of that is because under the
23 court order, Ms. Yates-Carter was to set up the account.
24 And she is in charge of it.

25 Q. Okay.

26 A. The purpose for me to be on it was so I could do
27 her banking.

28 Q. Makes sense to me.

1 MS. FYKE: This is a withdrawals slip dated
2 8-14-08.

3 THE COURT: Okay. That's Respondent's I for
4 identification.

5 MS. FYKE: I have the original if you would
6 like to look at it other than that. But --

7 (Whereupon, Respondent's Exhibit I was marked for
8 identification.)

9 BY MS. FYKE:

10 Q. Because does that look familiar?

11 A. I've never seen this before.

12 Q. It's a withdrawal slip from the bank.

13 A. It's a copy of -- looks like, yes.

14 Q. So not the specifics, but you recognize it as a
15 withdrawal slip?

16 A. Yes, I do.

17 Q. And can you tell us what the date on it is?

18 A. Well, you just said it was 8-14. And, yes,
19 that's correct.

20 Q. Did you withdraw any money out of the account
21 yesterday?

22 A. You know I didn't.

23 Q. I don't? I'm just -- I didn't know. I just
24 asked.

25 A. No, I did not.

26 Q. Did Ms. Yates-Carter withdraw any money?

27 A. No, she did not. It looks like someone violated
28 a court order and withdrew some money.

1 Q. But if the account is only set up for you two to
2 withdraw money, who else could have withdrawn the money?

3 A. The person who went to the bank manager and had
4 him print this out, and who convinced him to do a test
5 to see if she could, in fact, with his help override the
6 restrictions and withdraw a dollar. And that person's
7 name is Kathey Fyke.

8 Q. Okay. Did -- did you talk to the manager?

9 A. Yes, ma'am, I did. He said his superior had
10 already called him and he was in deep trouble.

11 Q. Pardon?

12 A. He was in trouble.

13 Q. Sorry. He was in --

14 A. Trouble.

15 Q. Oops.

16 A. He said it was only a dollar, but that you
17 convinced him was a test. And you convinced him your
18 name was on the title.

19 Q. I'm going to --

20 A. He didn't see the signature card.

21 THE COURT: Okay. So you are marking
22 something -- what is it?

23 MS. FYKE: This is a deposit slip, same day,
24 same bank.

25 THE COURT: Deposit slip for --

26 MS. FYKE: 8-14-2008 for a dollar and a
27 penny.

28 THE COURT: A dollar and a penny.

1 MS. FYKE: Yeah.

2 THE COURT: This is Respondent's J.

3 MS. FYKE: Yeah.

4 (Whereupon, Respondent's Exhibit J was marked for
5 identification.)

6 BY MS. FYKE:

7 Q. Can you will tell me what that shows?

8 A. It shows that, as you said, one minute after the
9 withdrawals, that a dollar and a penny was redeposited
10 back into the account.

11 Q. So the money was immediately put back; right?

12 A. Well, in fact, an extra penny was.

13 Q. Yeah. Okay. And that was just to differentiate
14 the two transactions?

15 A. That was part of the test, I presume.

16 Q. So the reality is, contrary to your testimony,
17 the account wasn't protected. Anybody --

18 A. No. The person who had the bank manager --

19 THE COURT: Hold on a second.

20 THE WITNESS: I'm sorry.

21 THE COURT: Hold on until the siren.

22 THE WITNESS: A person who had a bank
23 manager, who they had a personal banking relationship
24 with, could have the manager override the restrictions
25 and do a test like this. That's what happened.

26 BY MS. FYKE:

27 Q. What makes you think there were some -- how did
28 you put it? Something was overridden?

1 A. The restrictions on the account.

2 Q. Okay. The master account agreement; that's G as
3 in George?

4 A. The master account agreement. It's -- that is
5 not the master account agreement. It's not complete.

6 Q. According to this document I have a printout at
7 the bank, and it's interesting because looking at the
8 stuff at the bank, it says you did not have signature
9 authority, which is -- I'm just sharing that with you,
10 FYI.

11 THE COURT: Okay. Wait. Wait. Wait. Is
12 there a question because I'm going to strike all of that
13 because it was not a question.

14 MS. FYKE: All right. I'm sorry.

15 BY MS. FYKE:

16 Q. According to this document --

17 THE COURT: What document are you speaking
18 of?

19 MS. FYKE: H. The master --

20 THE COURT: But the witness has testified
21 that that's not the master agreement.

22 MS. FYKE: Well, it's labeled the master.

23 THE COURT: The witness has testified that
24 it's not the master agreement. Are you now testifying
25 as to what the document says?

26 MS. FYKE: No. I'm just looking for
27 something to identify it. And that's why if -- the
28 alleged --

1 THE COURT: Well, again, your question was
2 according to the master account agreement, that's H, and
3 the witness has testified that's not the master account
4 agreement.

5 BY MS. FYKE:

6 Q. According to the document H, it shows four
7 individuals as being notated as special. Do you see
8 that on the bottom?

9 A. I see the four rows and the four names above
10 them, yes, as special.

11 Q. And is there anything to distinguish Mr. Falcone
12 and myself --

13 A. No. They are all blank. There are no signatures
14 here.

15 Q. You never asked me for a signature; right?

16 A. Excuse me?

17 Q. I was never asked for a signature; right?

18 A. No. You were supposed to be -- because as I
19 said -- the original shows that you were the fiduciary
20 and he is the fiduciary, Mr. Falcone, and that Lynn is.

21 Q. Mr. Falcone is a fiduciary?

22 A. That's the way the bank set it up. And that
23 we're the ones with the signature.

24 Q. Okay.

25 A. It wouldn't show up on this because the card is
26 kept at the bank on Santa Clara Street.

27 Q. And what is this card?

28 A. It's this. Only it's filled out. It's the

1 original of this. Like I have copies of here.

2 Q. Okay.

3 A. And you were sent a copy of this when the account
4 was opened.

5 Q. But I never -- I wasn't expected to sign it;
6 right?

7 A. No. There was no place for you to sign it.

8 Q. Okay. So the reality is this original document
9 with your two signatures on it --

10 A. Yes.

11 Q. Is at the branch here locally; right?

12 A. Yes.

13 Q. Okay. But my Sunnyvale branch doesn't have a
14 copy of that document; right?

15 A. No, they don't.

16 Q. So when I go in to take money out, they just look
17 at what's on their computer screen; correct?

18 A. If you tell them -- yes, if you tell them it's a
19 test and you have your branch manager perform the test
20 with you.

21 Q. Okay. And what information do you have that I
22 had them override something?

23 A. Because he told me that you convinced him to do
24 it because you told him was just a test you wanted.

25 Q. No, you are right. It was a test because he had'
26 raised concerns, but you?

27 A. No. He said you raised concerns. You told him
28 you are not supposed to do it but you want his help and

1 he gave it to you.

2 MS. FYKE: I'm going to object. That's
3 hearsay, Your Honor.

4 THE COURT: Little bit late. You elicited
5 it. You have not timely objected. The objection is
6 overruled.

7 MS. FYKE: Okay.

8 THE COURT: Any further questions of this
9 witness?

10 MS. FYKE: No.

11 THE COURT: Ms. Yates-Carter?

12 MS. FYKE: I was going to say something.

13 MS. YATES-CARTER: No.

14 THE COURT: No.

15 MS. YATES-CARTER: She's already admitted,
16 Your Honor.

17 THE COURT: She had stated no further
18 questions.

19 REDIRECT EXAMINATION

20 BY MS. YATES-CARTER:

21 Q. Ms. Chastain, is there a court order in place
22 that prohibits either party from withdrawing any sum
23 whatsoever from the Washington Mutual account?

24 A. Yes. Without a court order or signatures of both
25 parties.

26 Q. Do you have a copy of that order with you?

27 A. Yes, I do.

28 THE COURT: Do you wish to have that marked

1 for identification?

2 MS. YATES-CARTER: I certainly do, Your
3 Honor.

4 THE COURT: I believe that's 28.

5 THE CLERK: Yes, Your Honor.

6 THE COURT: Petitioner's number 28 is a
7 court order of what date?

8 MS. YATES-CARTER: This is the court order
9 dated April 16th of 2007. I'd ask that it be marked for
10 identification at this time and admitted into evidence.

11 THE COURT: It is received into evidence as
12 Petitioner's Number 28

13 (Whereupon, Petitioner's Exhibit 28 was received into
14 evidence.)

15 MS. YATES-CARTER: Your Honor, I would like
16 to refer the Court to the second page of the order under
17 paragraph number 2, the language -- and this is an order

18 signed by Judge Lucas that Ms. Yates-Carter places the

19 net proceeds of the sale in a special interest bearing

20 account, trust account, as trustee for Richard D.
21 Falcone and Kathey Fyke, and that funds be released from
22 the special interest bearing account only upon the
23 written agreement of the parties or further order of the
24 court.

25 BY MS. YATES-CARTER:

26 Q. Ms. Chastain, is this the order you sent to
27 Washington Mutual bank?

28 A. It's the one I took over. The exact one I took

1 over when I opened the account. Yes.

2 Q. Thank you. Were you concerned, Ms. Chastain,
3 when you learned a withdrawal had been made from the
4 Washington Mutual account?

5 A. Yes, I was.

6 Q. Why were you concerned?

7 A. Because, I couldn't imagine how anyone could get
8 into the account. Once I was told who had done it, it
9 made sense.

10 Q. And that withdrawal was made at the Sunnyvale
11 office?

12 A. Our bank immediately -- our branch called,
13 checked -- they called me, and said there's someone
14 named Kathey Fyke who did it, and they referred me to
15 the branch manager.

16 MS. YATES-CARTER: Thank you. No further
17 questions of this witness, Your Honor.

18 THE COURT: Further recross?

19 RECROSS-EXAMINATION

20 BY MS. FYKE:

21 Q. Did they send you a withdrawal slip?

22 A. Well, no. I just found out about this this
23 morning. They haven't sent me anything.

24 THE COURT: Anything further?

25 MS. FYKE: No.

26 THE COURT: Anything further?

27 MS. YATES-CARTER: Nothing further, Your
28 Honor.

1 THE COURT: Okay. You may step down.

2 With regard to this issue, would you like to
3 set a contempt hearing?

4 MS. YATES-CARTER: Yes. Thank you, Your
5 Honor.

6 THE COURT: When would you like to handle
7 that?

8 MS. FYKE: Your Honor, can I say something?

9 THE COURT: No.

10 MS. YATES-CARTER: Would this be before you,
11 Your Honor.

12 THE COURT: Yes.

13 MS. YATES-CARTER: We can set a hearing in
14 trial. We'll have the bank manager here.

15 THE COURT: Let's do this. Let's set the
16 contempt hearing for the 22nd at 1:30.

17 MS. FYKE: That's fine, Your Honor.

18 THE COURT: The issue being involved is the
19 alleged violation of the court's order with regard to
20 withdrawal of funds. So, again, the contempt hearing
21 will be scheduled for the 22nd at 1:30.

22 MS. FYKE: Your Honor, can I have a little
23 flexibility in getting the branch manager here?

24 THE COURT: Well, I think that's probably
25 going to happen.

26 MS. YATES-CARTER: A subpoena will go out.

27 THE COURT: So looks like the branch manager
28 and appropriate documents will probably be here.

1 MS. FYKE: Your Honor, in the meantime, can
2 I ask them to change the documentation on the account so
3 that the funds are secure.

4 MS. YATES-CARTER: Your Honor, it was our
5 belief and it was only skullduggery that got a
6 withdrawal made from that account. I'm appalled by her
7 action.

8 MS. FYKE: Sir, it wasn't skullduggery.

9 THE COURT: Ma'am, we are going to take up
10 the issue on the 22nd with regard to that account. All
11 I'm going to tell you is you are not to go near that
12 account. You are not to have anything to do with that
13 account. You are not to attempt to access that account
14 in any fashion. Do you understand?

15 MS. FYKE: I understand.

16 THE COURT: Thank you very much. We will
17 resume once again Monday morning at 9 o'clock in this
18 department. Thank you very much.

19 MS. YATES-CARTER: Thank you, Your Honor.

20 (Whereupon, the proceedings were adjourned.)

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1 STATE OF CALIFORNIA)
2) SS.
3 COUNTY OF SANTA CLARA)
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6 I, PAMELA CARDIFF, DO HEREBY CERTIFY THAT THE
7 FOREGOING IS A FULL, TRUE AND CORRECT TRANSCRIPT OF THE
8 PROCEEDINGS HAD IN THE WITHIN-ENTITLED ACTION;

9 THAT, I REPORTED THE SAME IN STENOTYPE BEING
10 THE QUALIFIED AND ACTING OFFICIAL COURT REPORTER OF THE
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR
12 THE COUNTY OF SANTA CLARA, APPOINTED TO SAID COURT, AND
13 THEREAFTER HAD THE SAME TRANSCRIBED INTO TYPEWRITING AS
14 HEREIN APPEARS.

15
16 DATED THIS 22nd DAY OF AUGUST, 2008.
17
18

19 _____
20 PAMELA CARDIFF, CSR
CERTIFICATE NO. 11430
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EXHIBIT “D”

FILED

FEB 19 2009

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

DAVID N. YAMASAKI
 Chief Executive Officer/Clark
 Superior Court of California County of Santa Clara
 BY _____ DEPUTY
 Ann Vizconde

In re the Marriage of Falcone & Fyke:)	
)	
Petitioner: RICHARD S. FALCONЕ,)	No. 1-03-FL116312
)	
Respondent: KATHEY FYKE.)	AMENDED
)	ORDER RE
)	ATTORNEY'S FEES
)	AND COSTS

WHEREAS, on August, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, and October, 6 and 7, 2008, a Court Trial was conducted in the above-designated action as to the division of the community property, reimbursement claims, termination of spousal support, arrearages as to support, and breach of fiduciary duty, with the Court taking the matter under submission upon receipt of each parties' submission of their written closing arguments and proposed orders herein, which was followed by the issuance of the Court's "Proposed Statement of Decision" on December 10, 2008, and, after the receipt and consideration of objections thereto, it's "Statement of Decision" on December 23, 2008; and,

WHEREAS, at the outset of the foregoing trial, the issue of attorney's fees and costs was bifurcated (to follow the Court's rulings on the above-described issues), which were subsequently addressed by means of written declarations and supporting documentation, with each side filing their original requests by January 23, 2009; then any responses to the foregoing requests being filed by January 30, 2009; and, any replies by February 6, 2009, with the fees and costs issue being deemed to be under submission as of February 6, 2009; and,

WHEREAS, the Court has received from the Petitioner, his various declarations and supporting documentation as to his request for attorney's fees, costs and sanctions (with no such fees or costs request being received from the Respondent), along with a request to file an extensive fee declaration (which request is granted); the Respondent's opposition thereto, together with her application for leave of court to file an extensive responsive memorandum (which application is granted); followed by the Petitioner's reply in support of his claims, coupled with a request to strike the Respondent's opposition due to the manner in which it was served (this request being denied); and, after consideration of the foregoing;

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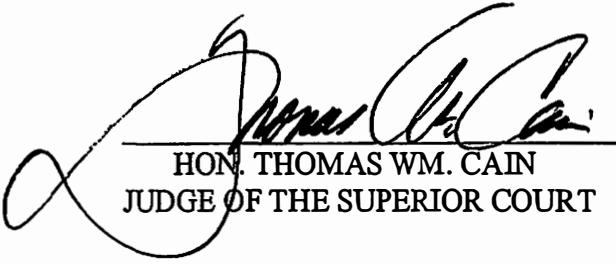
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NOW, THEREFORE, the Court makes the following Order:

The Respondent is ordered to pay to the Petitioner the total amount of \$833,025.72 in fees, costs, and sanctions under Family Code sections 271, 1101(g), 2102, 2103, 2104, 2105, 721, and 2032, Local Rules of Court 4D, 5L, 5N, and 6E(4), and In re Marriage of Feldman (2007) 153 Cal.App.4th 1470, with these fees, costs, and sanctions being paid from the Respondent's portion of the remaining funds from the sale of the parties' Saratoga property that are held in a special trust account at the Wells Fargo Bank.

The Court has considered the assets and debts of each Party, as well as their income and expenses. The Court finds that this order is just and reasonable under the relative circumstances of the respective parties; that it was necessitated by the Respondent's conduct which by all means and extent imaginable frustrated the policy of the law to promote settlement and reduce litigation costs in an absolutely groundless fashion; and, based upon all of the foregoing, will not impose an unreasonable financial burden on the Respondent.

Dated: February 19, 2009



HON. THOMAS WM. CAIN
JUDGE OF THE SUPERIOR COURT

EXHIBIT "E"

FILED

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

DEC 11 2008

DAVID P. YAMASAKI

Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara

BY

DEPUTY

Ann Vizconde

In re the Marriage of Falcone & Fyke:

Petitioner: RICHARD S. FALCONE,

Respondent: KATHEY FYKE.

No. 1-03-FI-116312

PROPOSED STATEMENT
OF DECISION

WHEREAS, on August, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, and October, 6 and 7, 2008, a Court Trial was conducted in the above-designated action as to the division of the community property, reimbursement claims, termination of spousal support, arrearages as to support, and breach of fiduciary duty (with attorney's fees and costs being reserved for a separate proceeding following the issuance of the Court's determination herein), with the Court taking the matter under submission upon receipt of each parties' submission of their written closing arguments and proposed orders herein, which submittals occurred on October 31, 2008; and,

WHEREAS, the Court has thereafter extensively considered the evidence received, and the legal contentions raised during the course of said trial, together with the arguments of counsel for the Petitioner and from the Respondent, appearing in pro per;

NOW, THEREFORE, the Court makes the following Proposed Statement of Decision:

The parties were married on May 5, 1985, and separated on September 28, 1997 (after a contested hearing to determine the date of separation), being a marriage of approximately twelve years and four and one-half months. The contested hearing as to the date of separation notwithstanding, the foregoing is the only aspect of this case that is of relatively little controversy. What is truly unfortunate is that the balance of the case is one that should have never seen the light of a courtroom, let alone the number of the days that was spent in this trial. The issues that are addressed below are all matters that could have been resolved by the parties with even the least bit of cooperation on the part of the Respondent.

Although in contested matters there is generally fault to be found with both sides, in this matter, the relatively isolated shortcomings of the Petitioner pale in comparison to the Respondent's delay tactics; the lack of any ascertainable direction or remotely perceptible objective on her part as to any issue; the endless motions (most of which had been previously been repeatedly ruled upon); the virtually valueless and lengthy time-consuming cross-examination of each and every trial witness; her many emotional

outbursts; and, her endless pretrial insistence upon providing almost nothing in terms of discovery responses to the Petitioner, that not only gave little indication as to where she was headed on the various issues, but resulted in the granting of an in limine motion that prevented her from presenting anything at time of trial that had not been previously provided to the other side which, unfortunately, placed her in a virtually impossible position to effectively advance anything on her own behalf.

Also, truly unfortunate is the fact that the foregoing pattern of conduct and handling of this matter is not unique to this trial on the part of the Respondent. The Appellate Court, in upholding prior determinations of this Court (and sanctions resulting there from), had stated that the Respondent's previous motions "were reckless, baseless and frivolous," and that "such conduct is an abuse of the legal system that is 'not fair to the opposing litigant who is victimized by such tactics.' (Citation). Furthermore, whether the abuse involves the trial courts or the Courts of Appeal, other litigants are prejudiced by the useless diversion of the courts' attention. (Citation.) And the judicial system and the taxpayers are damaged by what amounts to a waste of the court's time and resources. (Citation)." In re Marriage of Falcone & Fyke (2008) 164 Cal.App.4th 814, 830.

As a somewhat belated preface, it cannot be stressed too strongly how difficult it has been to commence the preparation of this "Proposed Statement of Decision." This is because even though the undersigned may disagree with the methodology by which someone chooses to proceed towards a particular trial objective, one can often still speak positively about the objective itself, or even if the objective itself is unrealistic, at least there is a philosophical understanding that can be acknowledged. But, when no such trial objective can be ascertained, and all that is presented is the questionable or disagreeable methodology, it is hard to start out in any way but in a manner which would not be perceived as being negative and one-sided. And, if such was not, in and of itself, difficult enough, ~~the Court was presented at the outset of the trial with a disturbing complication.~~

Exhibit "I" was 87 proofs of service covering the period November 2, 2006, to August 11, 2008 (the last being two days before the commencement of the trial herein), that were attached to (and filed with) the Respondent's pleadings that were served upon the Petitioner's counsel. All of the proofs of services were signed by a "Dora Williams" whose address was "████████ Avenue, Sunnyvale California 94086." Under oath, the Respondent described Dora Williams as a friend; where she resided and worked; and, more importantly, stated that she, the Respondent, did not sign the proofs of service. Testimony was then received that various means were utilized to locate Dora Williams, but without success. The resident manager of ██████████ Avenue in Sunnyvale for the past six years testified that she has never had contact with a "Dora Williams," and has never even heard of her (she also having reviewed records back into the 1990's with similar results.) An expert forensic document examiner (Exhibit "4") then testified that a comparison of samples of the Respondent's handwriting (Exhibit "3") with these proofs of service, caused her to reach the conclusion that the signature was not a true signature, and it was "highly probable" (95+%) certain that it had been written by the Respondent. Consequently, there was not only more than sufficient evidence to demonstrate that the

Respondent had not only given false testimony under oath, but that the proofs of service, that were executed "under penalty of perjury," by someone who was "a resident of the State of California, over the age of eighteen years, and not a party to the within action," was fraudulently prepared by the Respondent. (It is ironic that in her "Memorandum of Points and Authorities in Reply of Motion to Compel Discovery," that the Respondent earlier filed on April 5, 2007, at page 5, she admonishes the Petitioner at length for not knowing about such service requirements.)

Understanding that this all came unannounced to the Respondent at the very outset of the trial, the Court waited until the commencement of the next day's proceedings to point out its very serious concerns over this matter as it then stood, and its impact upon the believability of any of the Respondent's subsequent trial testimony. It also expressed the need to remove this "cloud" by having Dora Williams come into court and testify, under oath, as to these proofs of service. Subsequent thereto, almost on a daily basis, the Court inquired as to when it could expect to hear from Ms. Williams. The Respondent's repeated response was either that she "refused to say," or that "I'm working on it." As the end of the trial drew near, the Court set a time for Dora Williams to be present, or the Court would be forced to conclude that she did not exist, and that it was the Respondent who, in fact, had executed the proofs of service. At that date and time, the Respondent did not produce Dora Williams, nor did she provide the Court with a satisfactory reason why she could not do so.

It is important to understand that false testimony under oath, and the fraud that the execution of the proofs of service played upon the Petitioner, his counsel, the Court, and on the legal process itself, was not the only error that the Respondent committed as to this issue. With the Court, by repeatedly asking the Respondent as to the status of her efforts to bring in Dora Williams, was also, in effect, giving the Respondent an opportunity to "come clean" and admit that Dora Williams did not exist. But, by her responding that she "refused to say," or worst still, that "I'm working on it," was itself yet another lie, a lie that was repeated upon each inquiry by the Court. As troublesome as this compounding effect is, was the underlying, unexplainable aspect of "Why?" Why would someone go to the lengths that the Respondent did to create a fictitious person, including a created "signature," over an otherwise routine and rather mundane item such as a proof of service? And, despite the significance of the issue being repeatedly pointed out to her during the entire course of the trial, for the Respondent to not mention the issue in any explanation whatsoever in her written "Proposed Order of Respondent" that she submitted following the conclusion of trial is similarly baffling, particularly because this well-educated, otherwise intelligent individual, had yet even further time to consider its ramifications before submitting her written closing statement.

Family Residence

As to the actual trial issues themselves, the first is the family residence at 897 Rattan Terrace, Sunnyvale, California, which the Respondent currently occupies. Although purchased prior to marriage, little evidence was presented by either party as to their respective contributions towards its purchase such that the Court shall consider each

party as having contributed equal acquisition amounts. The real estate broker and certified appraiser with the State of California (and a formerly designated real estate appraiser expert in this case) (Exhibits "29" and "30"), determined that the fair market value of this property as of March 7, 2008 (in preparation for the originally scheduled May 12, 2008, trial date of this matter), by utilizing a "market approach" to valuation, as being \$690,000.00 (Report of March 21, 2008, Exhibit "31".)

The Respondent takes issue with this valuation based upon its use of comparable sales data from properties located in, allegedly, inferior school districts, in comparison with that of the subject property; that some of the sales were more than six months prior to the valuation date; that an error as to the designation of an area as a bedroom was made; that the backyard was actually smaller than the appraiser believed it to be; and, that the age of the property (and non-specific deferred improvements), along with window mold was not appropriately reflected in the appraisal. The appraiser testified that he personally viewed recent similar planned unit sales in Sunnyvale to see if they were the best match; that the "bonus room" was listed as a bedroom based upon county records; that the size of the backyard which he utilized was consistent with the Petitioner's testimony regarding access and use of the area behind the residence; and, that he was sufficiently familiar with the interior of the subject property (having personally viewed it previously), and that the presence of any window mold, although being a maintenance issue, was adjusted for in his valuation.

The Respondent also contrasts the date of this valuation with her own more "current" one of October 1, 2008, in which she claims to have only relied upon similar condominium sales within the same school district as the subject property which results, in her opinion, of a "conservative" fair market value of \$488,000.00. Aside from simply testifying orally to such a value, and that the sales upon which she allegedly relied were "comparable townhouses and condominiums . . . within two minutes" of the subject property, ~~there was no supporting competent evidence presented as to what comparable sales were used, nor the back-up information as to such sales (locations; dates of sale; sales price; sale terms; price adjustments made to reflect differences with the subject property such as size, age, amenities, condition; whether they were "arm's length" transactions; etc.), and the computations that demonstrated how the \$488,000.00 value was arrived at by the Respondent was also not presented into evidence. Consequently, although an owner can certainly testify as to his or her opinion of value of their residence (Evidence Code section 813(a)(2)), the weight given to such opinion, in this instance, is relatively little, particularly when contrasted with that of the appraisal expert.~~

Based upon the foregoing, the fair market value of this property is set at \$690,000.00, less the outstanding mortgage on the property of \$86,269.00 (Exhibit "CC"), for a net value of \$603,731.00. If the Respondent wishes to retain the residence, the Respondent is to pay to the Petitioner an equalizing payment of one-half of that amount, which payment is to be made within 60 days, after which, the Petitioner shall execute an inter-spousal deed transferring the property solely to the Respondent; that she is to then remain solely responsible for the payment of all debts or obligations owed to the Hidden Valley Homeowners Association; that she shall be solely responsible for any

other debts associated with the property; and, that she is to refinance the property to remove the Petitioner from the existing mortgage obligation, with the new financing being the sole responsibility of the Respondent.

Fair Rental Value of Rattan Terrace

With regard to the fair rental value of this property, the real estate appraisal expert testified as to the following rental values:

- 1997 - \$2,425.00 per month (Exhibit "41")
- 1998 - \$2,475.00 per month (Exhibit "40")
- 1999 - \$2,475.00 per month (Exhibit "39")
- 2000 - \$2,670.00 per month (Exhibit "38")
- 2001 - \$2,225.00 per month (Exhibit "37")
- 2002 - \$1,975.00 per month (Exhibit "36")
- 2003 - \$1,950.00 per month (Exhibit "35")
- 2004 - \$1,850.00 per month (Exhibit "34")
- 2005 - \$1,850.00 per month (Exhibit "33")
- 2006 - \$1,850.00 per month (Prior Court Order)
- 2007 - \$2,300.00 per month (Exhibit "32") (However, the "Findings and Order After Hearing," filed December 12, 2007, set the fair rental value at \$1,850.00 for February 27, 2007 to August 28, 2007)
- 2008 - \$2,300.00 per month (No specific survey or amount, but testimony of appraiser said it was higher than 2007 because the "rental market was on fire now".)

Based upon the foregoing, from the date of separation through to the end of August, 2008, the total fair market rental sum is \$286,309.00 (Exhibit "87"), with the Petitioner claiming 50% of which, or the amount of \$143,154.50, from the Respondent (with such payment obligation continuing after August, 2008, until such time as when she purchases his interest in the property.)

Aside from raising the same issues with regard to the quality of his comparable rental values as she did with the fair market value determination, the Respondent also contends in her "Proposed Respondent's Order" that the "Petitioner does not dispute that Respondent paid the mortgage, homeowner dues and assessments, taxes, insurance and repairs on the condominium since the date of separation," and that "(c)onsistent with the Court's prior order of December 12, 2007, Petitioner's claim for fair rental value" should be denied." (The December 12, 2007, "Findings & Order After Hearing," that the Respondent refers to, in addition to setting the fair rental value for the February – August, 2007, time period, did not deny the "Petitioner's claim for fair rental value," but rather stated that "The court makes no finding on the issue of the fair rental value before February 28, 2007." The Court continued by saying that "Given the Respondent's payments of mortgage[,] taxes, insurance and repair on the residence, the court denies

without prejudice Petitioner's request to deduct the fair rental value from spousal support.") Finally, as to the house-related expenses that she claims to have paid, the Respondent continues by stating that she is making "no claim for reimbursement of expenses prior to the date of the temporary support order in 2005."

The aspect of appropriate credits for such payments by the Respondent will be addressed below. As for the fair rental value of the subject property, the Court adopts the values of Mr. Frangadakis as set forth above. For the months of September, 2008, and following, until the property is conveyed in its entirety to the Respondent, or sold, the Respondent, as a consequence of her exclusive use of the Rattan Terrace property, is to pay to the Petitioner one-half of the \$2,300.00 monthly fair rental value. The monthly fair rental value shall remain at \$2,300.00 until competent evidence is received to the contrary at a noticed hearing. Such additional amounts shall be added to the equalizing payment due or, if the property is sold because the equalizing payment is not made, the Petitioner shall be paid one-half of the accrued fair rental value from the house proceeds.

Proceeds from the Sale of [REDACTED] Drive, Saratoga, California

As to the funds which are currently held in a Wells Fargo Bank special trust account (previously held in a Washington Mutual special trust account), being the sum of \$1,843,581.32, is to be preliminarily allocated \$802,551.57 (43.5%) to the Petitioner, and \$1,041,029.75 (56.5%) to the Respondent, which amounts take into account prior disbursements, either through escrow, or subsequent court authorized withdrawals, and accrued interest through July 31, 2008, with the interest accruing thereafter being apportioned pursuant to these incremental percentages of ownership.

To equalize the division of assets and debts as described in this Proposed Statement of Decision, including the various reimbursement claims, support amounts and offsets, along with other points addressed herein, said equalization payment shall be made from this Wells Fargo trust account. The distribution of this account, which is to reflect such equalization, is to occur after the hearing that is being held in abeyance as to the determination of fees, costs and sanctions herein, and which decision shall be also accounted for in the final distribution of this trust account.

As to the Respondent's various reimbursement claims made at trial, due to her failure to provide supporting documentation (either as to various prior discovery requests, previous court orders regarding the production of documents, or during the course of the trial herein), the Respondent did not meet her burden of proof as to: the state and federal taxes paid from the Dreyfus account (let alone account for any tax refunds received); whether credit card and other charges incurred from two to eight years after separation were, among other things, community in nature; the nature of the charges and source of payments allegedly associated with the "Saratoga Build;" and, the Nations Bank charge of \$5,000.00 as being related to the Screen Shop litigation (her testimony being unclear as to such.) Based upon the foregoing failure of proof, reimbursement is limited to that set forth in Ms. White's accounting (Exhibit "103".)

All available tax deductions from the sale of the property are to be evenly divided between the parties. Although the Petitioner represents that he has previously paid the taxes that he owed from the sale of the Saratoga property, each party is, nonetheless, ordered to report one-half the gain from this property sale on his or her state and federal tax returns and each shall be solely responsible for any resulting tax liability for their respective portion as their sole and separate liability, indemnifying and holding the other party harmless therefrom. Each party is to provide the other with their tax filings, along with cancelled checks and other proof of payment of these liabilities, within ninety (90) days from the date of the ultimate judgment herein.

Furniture, Furnishings and Vehicles

The Court accepts the estimated value of the furniture, appliances, household furnishings and equipment existing at the time of separation for this twelve-plus year marriage as being \$10,000.00 and awards these property items to the Respondent. The baseball autographs of Hank Aaron, Yogi Berra and Joe DiMaggio, the Frank Sinatra Compact Discs, the Mickey Mantle books, and the record albums purchased by the Petitioner prior to marriage are the separate property of the Petitioner, and the Respondent is ordered to return said items to the Petitioner by delivering them to the Law Offices of Lynne Yates-Carter, during normal business hours, within thirty (30) days of the judgment herein.

The parties had two vehicles at the time of separation, being an 1990 Acura Legend (driven by the Respondent) and a 1985 Audi (driven by the Petitioner.) The Audi became inoperable, and the parties purchased a 2000 Acura SL for the Petitioner's use which involved the withdrawing of \$31,730.31 from one of the Dreyfus accounts. The values of the vehicles (at time of trial, with no motion for an alternative date having been filed) shall be set, based upon the evidence received, and to whom they are awarded, is as follows: ~~\$8,888.00 for the 2000 Acura SL, which awarded to the Petitioner; \$3,175.00 for the 1990 Acura Legend, which is awarded to the Respondent; and, the Respondent is also awarded the inoperable 1985 Audi at a \$10.00 value. Each party is ordered to immediately secure his or her own car insurance on the vehicles that each is awarded.~~

Bank and Investment Accounts

At the time of the parties' separation they had the following accounts and balances:

Dreyfus account no. 4152 - \$143,625.00 as of September 30, 1997,
Dreyfus account no. 4714 - \$11,705.00 as of September 30, 1997,
Dreyfus account no. 4160 - \$63,376.00 as of September 30, 1997,
Dreyfus account no. 6921 - \$166,203.00 as of September 30, 1997,
Bank of the West account no. 0580 - \$11,200.28 as of October 14, 1997 (joint account retained by the Respondent),
Petitioner's Cal Fed checking account - \$453.24 as of September 28, 1997.

In Ms. White's accounting, the third check was treated as post-separation payment from the Petitioner to the Respondent. It was included in Ms. White's Excess Deposits analysis and the Respondent is required to reimburse the Petitioner for the entire balance of those excess deposits, so for accounting purposes, the Petitioner is charged with having received the third check in the amount of \$19,720.00, even though it was deposited by the Respondent.

The Court, in adopting Ms. White's accounting, finds that the Respondent is charged with the check that she cashed in the amount of \$22,320.77; the Petitioner is charged with two checks for a total of \$38,080.00; and, that as a consequence thereof, that the net due as a credit from the Petitioner to the Respondent, per Ms. White's report, of \$7,879.62.

The Court further determines that a correspondence of April 19, 2001 (Exhibit "63"), containing a pre-separation employment compensation buyout offer by Littler Mendelson that was directed to the Petitioner, was received by the Respondent at the Rattan Terrace property; that it was kept by her, knowing its contents (it appearing for the first time in the Respondent's trial binder for this trial); and, that by not forwarding it to the Petitioner (he having found out about it for the first time years later, on the eve of this trial), that he lost the opportunity to elect to receive such a buyout. It is the Court's determination that the sole cause of such a lost entitlement was the failure on the part of the Respondent to provide the information to the Petitioner, which was a breach of her fiduciary duty that was owed to the Petitioner. As a consequence of such breach, and by way of sanctions, the Petitioner shall recover this buyout amount from the Respondent, being the sum of \$53,441.16.

With regard to DLA Piper Rudnick Gray Cary, the Petitioner contends that a number of checks were sent to the Rattan Terrace property that the Respondent occupied during the period 2001 through 2004, and that she should reimburse him for these funds that she received in excess of what would be reasonable child and spousal support, however, no evidence was presented supporting such a receipt contention, and, consequently, no such reimbursement order is made. As for the Respondent, she claims that she is entitled to more than a recovery of the community's contribution of \$75,000.00 for Petitioner's partnership buy-in, but a "return" on this "investment." Other than a \$75,000.00 credit, which, as stated previously, is charged to the Petitioner, the Court declines to either award further amounts as a "return" on such an amount, or to retain jurisdiction over this matter, as requested by the Respondent, to allegedly determine further community interests as to amounts generated by this buy-in amount.

"Excess Deposits" (1997 through 2004)

Ms. White's schedules (Exhibit "95"), entitled "Excess Deposits 1997-2004," being her calculations of funds deposited in either the Bank of the West or Dreyfus accounts, that was then used by the Respondent over and above reasonable support, which overpayment totaled \$585,375.00 (actually \$585,374.00), was based upon the following non-taxable and non-deductible support that would have been due under the

With the exception of the Petitioner's checking account, the Respondent had sole control of these accounts and used these funds, for which she has failed to provide any accounting, cancelled checks, or documentation whatsoever for the use or disappearance of these funds, despite discovery requests and multiple prior court orders for her to do so. Consequently, with the exception of a \$75,000.00 credit for the Petitioner's partnership buy-in, the \$31,730.13 used to purchase the Acura vehicle, and the \$5,872.00 (all three of which are to be charged to the Petitioner), the Respondent is charged with the balance on each account (with the Petitioner being charged with his Cal Fed checking account.) These accounts are to be closed and distributed per this Order.

Life Insurance

The Court finds that there are no life insurance policies with cash value, and there is no community interest in the group term life policy the Petitioner has with his current employer. The Petitioner has no further obligation to maintain the Respondent as a beneficiary under this term life policy.

Retirement Plans

The DLA Piper US LLP Profit Sharing and 401(k) Savings Plan (including rollover of pension from Littler Mendelson and Gray Cary plans) was \$783,150.00 as of March 31, 2008, plus accruals to date, which is both community and separate property of the Petitioner, the separate property portion of which as of March 31, 2008, was \$32,435.92. Petitioner's Citibank Retirement Plan IRA is the sum of \$6,849.54 as of January 21, 2008, and the Respondent's Citibank Retirement Plan IRA was \$8,907.00.

The total community interest in all the plans as of October 7, 2008, according to Ms. Kristi Hernandez (whose analysis is adopted by the Court), was \$685,429.00, of which the Respondent and Petitioner are each entitled to one half. The Petitioner's separate interest in the retirement plans is \$149,853.00. Ms. Hernandez's analysis is to be forwarded by Petitioner's counsel to Ms. Suzanne Hunsinger, the court-appointed expert, for drafting of the appropriate QDRO. To the extent that there have been any gains or losses on the plans since June 30, 2008, the community gain or loss shall be divided between the parties and the gain/loss on the Respondent's share is allocated to the Petitioner.

Partnership Distributions

Three distribution checks were mailed by the Petitioner's prior employer to the Sunnyvale residence occupied by the Respondent, all three of which are deemed to be community property as they were earned during marriage. The \$18,360.00 check was never deposited by the Respondent, and was subsequently reissued to the Petitioner, which amount was retained by him. Another check in the amount of \$22,320.77 was cashed by the Respondent, and she is charged with receipt of that amount. A third check for \$19,720.00 was deposited by the Respondent into a Dreyfus account.

Santa Clara County Support Guidelines as represented by the Dissomaster:

<u>Year</u>	<u>Support Amount</u>	<u>Amount Deposited</u>	<u>Overpayment</u>
1997	\$ 19,651.00	\$ 25,374.00	\$ 5,723.00
1998	\$ 82,740.00	\$122,351.00	\$ 39,611.00
1999	\$ 85,593.00	\$179,430.00	\$ 93,837.00
2000	\$ 85,200.00	\$230,559.00	\$145,359.00
2001	\$119,074.00	\$236,641.00	\$117,567.00
2002	\$100,697.00	\$288,709.00	\$188,012.00
2003	\$ 93,524.00	\$189,146.00	\$ 95,622.00

For the year, 2004, involving the months of January through October 31, 2004, the support amount would have been \$92,948.00, and the funds actually deposited for this period was \$103,407.00. However, because these funds are being considered as a separate line item under the 2004 estimated tax return discussion below, \$92,948.00 is deducted from the accruing overpayment. For the portion of the year, November 1, 2004, to December 31, 2004, support would have been \$19,438.00, with funds deposited in the Bank of the West account of \$40,023.00, but \$27,993.00 is chargeable to the 2004 estimated taxes issue, such that the remaining \$12,030.00, when subtracted from the \$19,438.00 support for this period, results in \$7,408.00 as being owed, or in this instance, being subtracted from the accruing overpayment, with the net result of all of these calculations being the Respondent having received \$585,374.00 in excess deposits, above and beyond support, for the period September 28, 1997, through December 31, 2004.

The Respondent, although acknowledging receipt of these deposits, and characterized them as being given to her "to pay the bills" (and "voluntarily" given to "pay the Petitioner's own bills and not in lieu of support"), she contends that there was never an agreement that she should have to pay any of these funds back to him, or account for their use. She further claims that these funds were utilized to finance the building of the Saratoga home; to pay for the Petitioner's estimated taxes; was the source of the Petitioner's law firm buy-in; to purchase the Petitioner's 2000 Acura vehicle; to pay for the Petitioner's credit cards; to, on a limited basis, make the mortgage payments; and, generally used towards the payment of community debts. The Respondent also questions several assumptions upon which the support was calculated, but presents no evidence, either at the time of trial, or in her "Proposed Order of Respondent," as to what the correct assumptions should be.

To the extent that she has sufficiently demonstrated that she has paid various items, credit has been given to the Respondent elsewhere in this Proposed Statement of Decision, otherwise, there is a lack of sufficient evidence that has been presented by the Respondent to support her contentions. Consequently, the \$574,782.00 is chargeable to the Respondent.

Additional Smith/Ostler Support

The "Findings and Order After Hearing" filed on February 8, 2005, after setting monthly spousal and child base support stated: "Any additional income of Petitioner over and above \$17,000 monthly will be paid to Respondent pursuant to a Smith Ostler calculation." The appropriate percentage that was to be utilized to obtain such a Smith/Ostler determination, or the amount due, or even the date by which such additional support was to be paid, was never set, and no subsequent motion was ever filed to determine any of these unknown aspects. Of note is the further provision that "This order is made without prejudice to modification and the Court reserves the right to make it retroactive to the date the Order to Show Cause was filed (November 24, 2004)."

The Respondent claims that the amount of additional Smith/Oster support owed for the period January 1, 2005, through October 6, 2008, is the sum of \$633,423.00, plus accumulated interest of \$92,123 (exhibits "RR" and "TT".) She also seeks an "equity" payment of 12% (\$87,066.00) "to compensate for the higher tax bracket since the support will all issue in one year and not across four and in conjunction with the loss of unused itemized deductions." (It is also noted that prior to January 21, 2008, that the parties, then minor son resided 100% with the Respondent. After that date, he then resided 100% with the Petitioner, and on June 14, 2008, he graduated from high school. This aspect does not appear to be reflected in the Respondent's figures, but is shown in Ms. White's calculations below.) The Respondent also claims that the income to which the Smith/Ostler component is applicable is not merely limited to "cash disbursements" from the Petitioner's law partnerships, but "would encompass income from all sources."

Ms. White, on behalf of the Petitioner, presented four possible scenarios for the period from January 1, 2005, through August 31, 2008 (Exhibit "96".) The first was to treat the Petitioner's income as wages (which was the original assumption of the court when the order was set), even though he was self employed, with no deductions; adding the amount due under the bonus table until June 19, 2007, at which time a prior court finding imputed \$2,500.00 in income to the Respondent; and, adjustments for the child moving in with the Petitioner, all of which resulted in an additional support amount of \$419,624.00. The second methodology was to re-characterize his income as self-employed income, rather than wage income, along with the medical insurance that the Petitioner paid, and the itemized deductions available each tax year (with the same imputing of income to the Respondent, and child living situation), resulted in \$312,017.00 for additional support.

The third approach includes the same as the second scenario, but places a marital standard of living "cap" on the amount that is attributable to spousal support, which then resulted in \$261,659.00 being owed. In her "Marital Standard of Living Summary" (Exhibit "91"), Ms. White determined that the marital standard of living for the Falcone/Fyke marriage was \$12,327.00 per adult pre-tax monthly, and \$8,784.00 monthly after taxes. This marital standard of living, and how it was determined, was uncontested by the Respondent at time of trial, and with no alternative standard being presented, the Court adopts Ms. White's testimony as to such standard of living. The

final scenario uses the same assumptions as the third one, with the exception that the imputation of income to the Respondent was treated as beginning on November 28, 2004, the date of the first order, which then resulted in additional support being \$211,599.00.

The Petitioner advocates that the Court accept the final scenario in that as of November 28, 2004, the parties had been then separated over seven (7) years with the Respondent making no effort whatsoever to become trained or employed. Also, he contends that it is appropriate to factor in the marital standard of living, as the Respondent is not entitled to live at a standard of living greater than the one she had during the parties' marriage. With regard to the Petitioner's further contention that this Court is empowered, by virtue of the prior order stating that it reserved the right to modify the support retroactive to November 24, 2004, to adjust the original assumptions regarding the setting of additional support, the Court concurs.

As to the various scenarios presented, and consistent with this ability to modify support retroactive to November 24, 2004, the Court adopts the third approach, in that the evidence demonstrated that the Petitioner was, in fact, self-employed and that his income should be treated as such; that a marital standard of living "cap" is appropriate; and, that the imputation of income to the Respondent, consistent with the commencement date of the earlier order, was to continue in effect. Although the claimed lack of efforts to become trained or employed might justify the imputation of income at an earlier point in time, the fact that such imputation of income was set by a prior court order, as opposed to the Court considering other facts and circumstances that gave rise the retroactive adjustments above, calls for, in the opinion of this Court, a different procedural treatment to extend it, and it is, therefore, reluctant to make such a retroactive change. Consequently, the amount of additional spousal support owed by the Petitioner to the Respondent is the sum of \$261,659.00 (with each annual component being due on December 31st of each year), together with simple interest thereon at the rate of ten (10%) per annum from the date each annual payment was to be made, until paid. (No additional award is made for any tax consequences or lost deductions.)

As to the issue raised by the Respondent of support checks received from the Petitioner that were timely paid for the period February, 2005, to August, 2005, in the total sum of \$39,598.00, which were not honored by the bank in that the Respondent failed to cash them until up to a year after they were given to her (and by which time they were treated as "stale" by the bank), the Court orders that said principal amount only is to be paid by the Petitioner to the Respondent, but without any interest thereon, as a consequence of the Respondent's negligence that resulted in the bank failing to honor the checks. As to the March 1, 2008, spousal support check of \$4,462.00, which was not honored by the bank due to insufficient funds, said amount is to be paid by the Petitioner to the Respondent, together with interest thereon at the rate of ten (10%) per annum from March 1, 2008, until paid.

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Tax Refund/Liability

From 1997 through 2004, the Petitioner forwarded money to the Respondent to pay estimated personal income taxes. The parties thereafter filed joint tax returns for this time period, with the exception of the year 2004. The result at times was a refund, at times a liability, and in 2004, a major liability occurred that the Petitioner contends amounted to a breach of fiduciary duty by the Respondent.

In 2004, the Petitioner continued to forward money to the Respondent for the estimated personal income taxes, with his assumption, as had occurred in the past, that a joint return for that tax year would be filed. In all, he forwarded to the Respondent \$131,400.00 for such 2004 estimated taxes. However, the Respondent filed her own separate state and federal tax returns for the tax year 2004 (Exhibit "65"), and claimed virtually all of the estimated tax payments on her separate returns (only \$27,000.00 was allocated to the Petitioner in the returns filed by him (Exhibit "64").) The Respondent claimed \$108,000.00 in estimated taxes on her federal return and \$23,400.00 on the state return, for a total of \$131,400.00 (which was adjusted downward by the taxing authorities for the \$27,000.00 allocated to the Petitioner.) The Respondent received tax refunds of \$67,414.00 on her 2004 federal return, and \$19,299.00 on the state return, whereas the Petitioner incurred large tax liabilities, penalties and interest, that also resulted in liens and wage garnishments being imposed upon him. Despite repeated requests to do so, the Respondent has never compensated the Petitioner for this liability or shared the refunds.

It is the Court's determination that the Respondent breached her fiduciary duty to the Petitioner under Family Code sections 721 and 1101, and the Court finds that the Petitioner is entitled to reimbursement for the 2004 estimated tax payments Respondent claimed in the amount of \$104,400.00, plus interest thereon at the rate of ten (10%) percent per annum from April 14, 2005, until paid, along with the federal and state income taxes (which included penalties and interest paid) of \$27,001.00, plus interest on that amount from April 14, 2005, until paid, together with attorney's fees, costs and sanctions as will be addressed at the time of the subsequent attorney's fee motion herein.

Screen Shop Litigation

This is a claim by the Respondent of \$18,946.25 that the Petitioner owes to her while she was overseeing the construction of the Saratoga residence, specifically as it relates to a business called the Screen Shop which was to supply windows to this location. When the windows were not going to be timely delivered, in the Respondent's opinion, she initiated a stop notice on her credit card payment. Consequently, when the company learned of the stop payment, they insisted that the Respondent pay cash for the windows before they would deliver them, which the Respondent refused to do. Lengthy litigation at both the trial and appellate court levels, which the Respondent adamantly refused to settle, resulted in a judgment be entered that caused the Petitioner's wages to be garnished in the total amount of \$18,946.25 (Exhibits "43" through "47," inclusive.)

The Respondent contends that the Petitioner was the "originating Plaintiff in the case as well as the attorney representing the Respondent and himself," and that it was the "Petitioner's behavior in pursuing the litigation and then failing to properly represent the parties and write the appeal briefs [that] resulted in the debt." However, after presiding over this two-week trial, and the numerous hearings leading up to it, along with the Court being familiar with the Respondent's personal involvement with the lengthy proceedings at both the trial and appellate court levels in the case herein, and the more than ample opportunity to personally observe the respective demeanors of both the Petitioner and the Respondent, for the Court to not accept for one moment the proposition that any litigation that the Respondent was involved in was not completely, and totally controlled, directed and dictated by her, is beyond reasonable belief. But, rather than viewing it as a breach of fiduciary duty, as requested by the Petitioner, the obligation involving the Screen Shop is treated by the Court as a community debt, for which the Respondent is to reimburse the Petitioner for one-half of the amount, or \$9,473.12, together with interest thereon at the rate of ten (10%) percent per annum from October 14, 2005 (the date of the first garnishment (Exhibit "44")), until paid.

Respondent's Attorney Fees Paid by Petitioner

This is a claim that the Respondent should reimburse the Petitioner for \$10,000.00 that he paid to her in 2004 so that she could retain an attorney to represent her in this case. The evidence at trial was that these monies were paid from the Petitioner's separate property income, after the date of separation, and the Respondent is ordered to reimburse the Petitioner the sum of \$10,000.00, together with interest thereon at the rate of ten (10%) percent per annum from the date that said funds were provided to the Respondent, until paid.

Respondent's Reimbursement Claims

Based upon a lack of sufficient supporting evidence, the Court declines to make any order with regard to the following: the payment of the parties' son's educational expenses, or to set up any fund for such purpose; the payment of "community debts" allegedly paid by the Respondent in the amount of \$196,138.00; the replacement of Microsoft software that was allegedly taken by the parties' son in the amount of \$162.00; and, any further obligation, beyond which the Petitioner has already provided or offered to provide to the Respondent, with regard to her health insurance coverage or as to any medical bills that the Respondent has refused and/or neglected to submit to any health insurance carrier for payment.

Termination of Spousal Support

The Petitioner seeks to terminate all spousal support, and the court's jurisdiction over such, effective June 19, 2007, the date that he filed his motion as to such request (the hearing of which was deferred to this trial by prior court order.) The Petitioner basically contends that since the September 28, 1997, date of separation, that the Respondent has failed to make any meaningful efforts to become self-supporting, despite possessing a

Bachelor of Science Degree in Microbiology since 1975; having previously worked for Johnson and Johnson as a Veterinary Microbiologist as well as various employers in the Bay Area; and, having obtained a Masters in Business Administration from Santa Clara University in 1980.

The Court has considered the extensive positions that each side has set forth in support of, and in opposition to, this request, particularly in light of the long duration of the marriage and the Supreme Court's admonition that "(i)f the record does not contain evidence of the supported spouse's ability to meet his or her future needs, the court should not 'burn it bridges' and fail to retain jurisdiction." In re Marriage of Epstein (1979) 24 Cal.3d 76, 91. The Court has also reviewed the cited cases of In re Marriage of Morrison (1978) 20 Cal.3d, 437, In re Marriage of Sheridan (1983) 140 Cal.App.3d 742, In re Marriage of Rosan (1972) 24 Cal.App.3d 885, In re Marriage of Shaughnessy (2006) 139 Cal.App.4th 1225, In re Marriage of Schaffer (1999) 69 Cal.App.4th 801, as to not only the law cited that bears on this issue, but the facts as to the duration of the respective marriages that were being addressed, and the time and efforts made to become self-supporting (or lack thereof), and how it relates to the facts of this case.

There are two other factors that the Court has extensively considered as to this request. The first, was in addition to the chronology of meetings, court proceedings, and the efforts of the Respondent to oppose them, as to simply obtaining a vocational evaluation that is set forth in "Petitioner's Closing Argument," was the actual testimony of Mr. Peter Davie, a vocational counselor/evaluator of thirty years, which required two court orders before the Respondent first met with him, and whom he described as the most difficult of any client in thirty years to get to return a telephone call (with long passages of time between communications.) He described the Respondent as, among other things, not engaged in the vocational process; that he had no indication that she was attempting to gain employment; that he was aware that she was challenging the order for a vocational evaluation, but unaware of the circumstances that was prompting the challenge; her communications raised concerns that she had no desire to work; that what work efforts statements that he received either did not contain efforts to get a job (just objecting to being self-supporting and having to look for work), or raising unethical behavior allegations as to either Mr. Davie or Ms. Yates-Carter; that her challenging the request for work effort orders was viewed by her as complying with the vocational evaluation process; and, her never providing correspondence that she initiated with any potential employer. As she evidenced in other areas, with Mr. Davie she would repeatedly create self-imposed procedural requirements as to how things should be handled, and when they were not immediately objected to, she would view them as not only being the accepted methodology for doing things, but would use the subsequent failure to abide by her self-created rules as a justification for either her non-compliance, or as a basis for unethical conduct claims.

(As a parenthetical note, with regard to the claims of being the most difficult in thirty years to communicate with by a professional who, as a consequence of dealing primarily in the high conflict area of domestic relations, is normally accustomed to dealing with difficult situations, is a similar observation by Mr. John Fournier who has

been with the law firm of Paine & Fears since 1993, and as the firm's Executive Director oversees all aspects of the firm's non-legal functions (personnel, accounting, facilities, etc.) The Respondent contacted him with regard to her health care coverage as a consequence of the Petitioner's employment with their firm, and although it involved only a couple of telephone calls, Mr. Fournier, who has had to deal with all manner of difficult employee issues and firm partner disputes, described the Respondent, whom he had never met, as very combative; having treated him like "dirt and garbage;" and, was so upsetting for him as to cause him to describe it as his "never having had a similar experience in fifteen years.")

The second aspect considered is a comment that the Respondent made during the course of the trial to the effect that it takes a lot of time to handle this case on her own behalf. The court's file consists of at least nineteen volumes (the number is uncertain in that additional proceedings are occurring in another department.) The Respondent's last attorney withdrew from the case mid-way through volume three. There have been at least ten appeals filed by the Respondent (with the Court being aware of yet an additional one being filed by her as to another department's decision last week), with none being successful. She has contested literally every determination that the court has made in this matter (and in some instances repeatedly so), from whether she was even served with initial Petition for dissolution, to the date of separation, onward, and which included the filing of at least ten motions to reconsider or to grant new trials on "all issues." An example of the foregoing relates to the sale of the Saratoga property.

Although discussing it in advance with the Respondent, and receiving a purchase offer of over \$2 million, the Respondent refused to sell. A meeting between the attorneys was arranged, but she did not want to meet or sell. A motion was set, and continued, that ordered the sale over the Respondent's objection, with Mr. Edward Mills being appointed, initially, as a Referee, and later as a Judge Pro Tem, to oversee the sale of the property (~~with the earlier offer having been lost.~~) ~~Mr. Mills asked that each party~~ nominate three realtors, with the Respondent failing to do so. Although a realtor was selected, and an offer received, the prospective purchasers withdrew their offer after speaking to the Respondent who said she would contest any sale. Another realtor was then selected, to which the Respondent refused to sign the listing agreement, which Mr. Mills had to do on her behalf after getting court authorization. After obtaining another offer, the Respondent did everything she could to obstruct the sale – she refused to sign the sales agreement or the escrow documents (a court order was needed to approve the escrow instructions, to which she filed objections, then sought a writ to stay the sale pending appeal;) she threatened to sue if the sale went through (the clerk of the court had to sign the deed;) she filed objections to the sale of the property claiming the court lacked authority to force a sale; and, appealed the sale offer. After the sale proceeds were received and placed in an interest bearing trust account (which will be discussed further below), the Respondent refused to "touch" the proceeds (when monetary advances were offered to address her numerous attorney's fees requests), because to do so would somehow recognize this improper sale. If one were to appropriately describe the Respondent's vocational aims, it would truly be that this case is, by choice, her life's work (in her "Proposed Order of Respondent" she states "the divorce became

Respondent's full time job.”)

The Respondent's response to this support termination request is that she “is not competitive in the job market,” because “(s)he is viewed as overqualified/over educated for the more entry level positions.” She claims to have “made efforts in obtaining her own vocational evaluation and additional software training,” which aside from being an admission that she, in effect, wants to do it her way, as opposed to working with Mr. Davie, is totally lacking sufficient evidentiary support as to any such “efforts.” Also lacking any supporting evidence at time of trial was her claims, or the identity of the parties to which she is referring, that “(s)he has been working on several business ideas and developing plans with third party sources.” The concern is that as to such a contention, we may be speaking about yet another “Dora Williams.” Despite these claimed “efforts,” and with no child care needs or health care needs, the Respondent's bottomline response to the request to terminate spousal support is that she not only wants it increased to \$16,525.00 per month, but wants an additional \$21,780.00 to be awarded to her from the Petitioner “for an additional two years to learn new skills” (despite claiming to already be “overqualified/over educated”). It is the belief of this Court that such amounts have nothing to do with any legitimate support needs (regardless of the duration of the marriage), or anything to do with becoming self-supporting, but is merely designed to financially underwrite her litigious career choice.

The Respondent also asserts, in a single five word sentence, “There was no Gavron warning,” and nothing more. She does not contend that she was unaware that it is the goal of this state that each party must make reasonable good faith efforts to become self-supporting as provided for in Family Code section 4320, and that the failure to make reasonable good faith efforts may be one of the factors considered by the court as a basis for modifying or terminating support. In Gavron, involving a 25 year marriage, with the trial court terminating support less than nine years after date of separation, the appellate court was concerned that under the circumstances “that there should have been some reasonable advance warning that after an appropriate period of time that the supported spouse was expected to become self-sufficient or face onerous legal and financial consequences.” In re Marriage of Gavron (1988) 203 Cal.App.3d 705, 712. However, Gavron also states that “(t)he prerequisite awareness of the judicial expectations of future self-sufficiency can arise in numerous contexts. For example, there may be an explicit statement by the court at the time of its original support order regarding employment expectations of the supported spouse (In re Marriage of Sheridan, supra, 140 Cal.App.3d at pp. 746, 748), [or] a motion and ensuing order that the supported party “submit to an examination by a vocational training consultant” (Civ. Code sec. 4801, subd. (e)), . . .” Ibid (emphasis own.)

In Gavron the appellate court stated that “the record does not indicate” that the wife in their case “had any prior awareness that the court would require her to become self-sufficient,” or that the “record here is barren of any such evidence” as to a future cut-off of support after gradually decreasing the support payments. 203 Cal.App.3d 712, 713 (emphasis own.) Here the “record” is very much different. Not only is there an order that she “submit to an examination by a vocational training consultant,” but there are

three such orders (March 16, 2006, May 23, 2007, and October 23, 2007), with the testimony of Mr. Davie, as described above, as amounting to a failure on the Respondent's part to comply with, or actively engage in, the vocational evaluation process. Of particular importance is the court's minute order of October 23, 2007 (the time of the third order), that states, in part, as follows:

"The policy of the state is that parties make reasonable efforts to become self supporting. Respondent did not offer evidence of efforts to obtain employment and gave no reason having to do with health, education or minor child why an Employment Efforts Order should not issue. There was evidence that respondent is well educated and capable of working. Court issues an Employment Efforts Order on respondent."

Aside from the significance of the wording of this order is the fact that in the Respondent's Reply Memorandum that she, personally, prepared and filed on October 16, 2007, as to this hearing, is where the Respondent talks at length about the Petitioner's request for Gavron warnings to be made at this hearing. Consequently, the Respondent by her discussion of Gavron, and the court's subsequent findings and order, would appear she was aware of the policy of this state as to the need for becoming self-supporting and the impact that her non-compliance would have upon the continued receipt of spousal support. Furthermore, at the subsequent compliance hearing of February 14, 2008, as to Employment Efforts Order it issued on October 23, 2007, the court made, in part, the following findings and orders:

"The respondent has failed to comply with the employment efforts order and has failed to meet the burden of proof. The court adopts the calculation of \$2500 per month or \$30,000 per year. This imputation of income is without prejudice to adjust to a higher level. The employment efforts order continues in effect."

Consequently, more than simply being given a Gavron "warning," because income was imputed to her based upon her failure to comply with the employment efforts order, she actually received first-hand knowledge as to how such non-compliance can effect her spousal support. Therefore, with her testimony at trial (a year later) with regard to her claimed employment efforts being viewed as continuing to be inadequate, and weighing the Family Code section 4320 factors to the facts herein, it is the determination of the Court that spousal support shall be terminated, effective January 1, 2009 (this effective date being a further consideration as to the long-term nature of the marriage, despite the Respondent's conduct.)

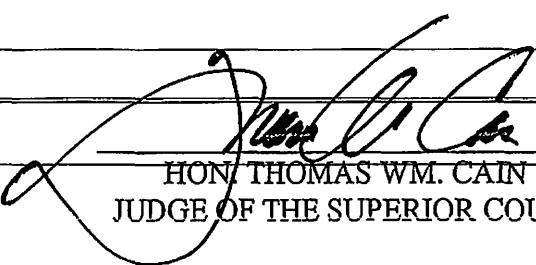
Before concluding, there is one additional observation that should be noted. Although the numerous issues addressed herein should have been resolved by the parties without the necessity of trial, as noted at the outset, the length of the trial was unnecessarily increased by the Respondent due to her "creating issues" that did not previously exist. By that is meant that in the middle of trial, at the conclusion of a particular day's session, the Respondent decided to go to the Sunnyvale branch of the Washington Mutual Bank to conduct a little "test." As stated previously, by court order

of April 16, 2007 (Exhibit "28"), the proceeds of sale of the Saratoga property (that presently amounts to \$1,843,581.32), was to be placed into a special interest-bearing trust account, with Ms. Lynne Yates-Carter to be the trustee for the benefit of the parties. The funds were to be released only upon further order of the court, and even though the account was for the benefit of the parties, neither was permitted to access it, with both parties being aware of such lack of access.

The Respondent, allegedly, because she wanted to see how "safe" the account was, talked the Sunnyvale branch manager into withdrawing \$1.00 from this trust account, and then immediately re-depositing \$1.01. This is all despite the fact that the Respondent testified that she was unaware of any account withdrawals that were not done without prior court approval, and that she was unaware of any present threats to access the account. Aside from the fact that her totally unnecessary actions could possibly result in the termination of employment for the subject bank branch manager, the Respondent took it upon herself to violate the prior court's order that she have no access to this account, the minimal invasion of the account notwithstanding. All of this, again, resulted in wasting time that the Respondent could have otherwise utilized in presenting her own case, and was yet another example of what was noted by the appellate court at the outset as being "the useless diversion of the courts' attention."

This Proposed Statement of Decision shall become the Statement of Decision if no objections are filed with the Court within 10 days from the mailing of this document; that any objections are to be filed with the Court with a courtesy copy delivered to the Court on the same day; and, upon the Statement of Decision in this matter becoming final, the Petitioner's Counsel is to submit a Proposed Order consistent with the terms of said Statement of Decision.

Dated: December 10, 2008


HON. THOMAS WM. CAIN
JUDGE OF THE SUPERIOR COURT